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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1367

CHARLES QUINN BLACKWELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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To the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered by the Court of Appeals in the following cases: **Charles Quinn Blackwell, Appellant v. United States of America, Appellee;** No. 25522; and **Charles Quinn Blackwell, Appellant, v. United States of America, Appellee,** No. 25523; under date of January 16, 1969, and the denial of the motion for rehearing on February 7, 1969.

CITATION OF OPINION BELOW.

The opinion of the Court of Appeals dated January 16, 1969, and the order denying the motion for rehearing on February 7, 1969, are attached hereto.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 16, 1969. Rehearing was denied on February 7, 1969. The jurisdiction of this Court is invoked under 28 USC, Section 1254.

QUESTION PRESENTED.

Whether a defendant in a criminal proceeding is denied due process of law or are his rights otherwise jeopardized or violated in requiring the defendant to appear, under subpoena, before the same grand jury that returns indictments against him, and whether the defendant's right against self incrimination is violated where the defendant, in such a case, is required to give testimony before the same grand jury that indicts an alleged co-conspirator on the same transaction for which the defendant is later indicted and convicted.

STATUTES INVOLVED.

The statutory provisions involved are the due process clause of the Fourteenth (14th) Amendment of the Constitution of the United States and the Fifth (5th) Amendment to the Constitution of the United States.

Defendant was indicted and convicted for violation of the following statutes:

18 USC 1341—Mail fraud conspiracy;

18 USC 1952—Conspiracy—Traveling in interstate commerce to carry on an unlawful activity of arson.

and four substantive counts of

18 USC 1341 and
18 USC 1952 in No. 25522 below and one count in 25523 for violation of 18 USC 1341.

These statutory provisions are printed in the Appendix hereto.

STATEMENT.

Petitioner was indicted, in case No. 25522 below, on a six count indictment charging him with conspiracy and substantive violations of 18 USC 1341 and 18 USC 1952 and in case No. 25523 on a substantive count of violation of 18 USC 1341.

The charges arose from the use of the mails and interstate commerce to carry on an unlawful activity—arson—to defraud insurance companies.

Petitioner was an insurance adjuster and was convicted for the above violations in substance, charging that Petitioner 1) conspired to obtain insurance upon houses and 2) that he caused the same to be burned and participated in collecting the insurance thereon.

The crux of the question presented by this petition is whether the rights of Petitioner were prejudiced by the government's requiring Petitioner to appear under subpoena before the same grand jury that later indicted Petitioner.

The question of Petitioner's rights was raised timely by counsel in the trial court and the District Court agreed to make an "in camera" examination of the evidence produced before the grand jury.

At the trial of the case in the District Court, as reflected at page 5 of the opinion of the Court of Appeals,

the trial court examined the grand jury proceedings, and, the Court of Appeals held that the granting of the in camera examination was tantamount to granting the motion to suppress the evidence.

The Court of Appeals further held that Petitioner was not prejudiced by the grand jury appearance and that the appearance of Petitioner did not violate his rights against self-incrimination.

Petitioner was not permitted to know the extent of the in camera inspection by the trial court and can only assume that no testimony or the fruits thereof were allowed or introduced in the trial of his cases.

REASONS FOR GRANTING THE WRIT.

The primary and basic reason for the necessity of the granting of the writ is to put at rest the question of the rights of an individual who is required to appear before a grand jury, under subpoena and with a subpoena duces tecum, where the person appearing before the grand jury is later indicted by the same grand jury for offenses purporting to arise from the business of the witness, later defendant.

Another reason for the granting of the writ is to put at rest the question of requiring a witness to appear and produce documents before a grand jury where the grand jury has before them for consideration charges against another that involve the acts of the witness.

The Court of Appeals cited **Chapman v. California,** 1967, 368 U. S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705, on harmless constitutional error, to support its decision of lack of prejudice. That case dealt with a state court proceeding.

An examination of 38 A. L. R. 2d 225 and the later case service shows the conflict in the several jurisdictions as to

the rights of an individual who is required to appear and produce documents before a grand jury.

Without question, such an appearance is at least a proceeding that requires utmost caution to assure the protection of the rights of the witness.

Without question, the constitutional guaranty against self-incrimination is applicable to such a proceeding.

The question presented is of importance to both individuals and to the federal government in putting to rest the question and establishing, without question, the rights of all concerned in requiring a suspected or possible defendant to appear and give testimony.

This is of particular importance when viewed in the "link of the chain of evidence" rule that taints any testimony obtained in violation of the rights of the individual.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

This 6th day of May, 1969.

Respectfully submitted,

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APPENDIX.

APPENDIX A.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 25,522.

Charles Quinn Blackwell, Jr.,
Appellant,

versus

United States of America,
Appellee.

No. 25,523.

Charles Quinn Blackwell, Jr.,
Appellant,

versus

United States of America,
Appellee.

Appeals From the United States District Court for the Middle District of Georgia.

(January 16, 1969)

Before Bell and Coleman, Circuit Judges and Henderson, District Judge.

Bell, Circuit Judge: Blackwell was convicted in No. 25,522 on five counts of an indictment. He was charged

with a conspiracy in the first count based on violations of Title 18 USCA, §§ 1341 (mail fraud) and 1952 (traveling in interstate commerce to carry on the unlawful activity of arson). The other four counts were substantive counts charging violations of 18 USCA, §§ 1341 and 1952. The alleged criminal activities centered on his role as an insurance claim adjuster and the fact of having two houses burned in order to collect the proceeds from insurance theretofore obtained on the houses. In each case the fire loss was adjusted by Blackwell. The mails were used in the adjustment process. The arsonist traveled in interstate commerce in carrying out the scheme.

Blackwell claims that the evidence was insufficient to support the guilty verdict. The testimony of his accomplices was more than enough to take the case to the jury and thus this assignment of error is without merit.

He contends that the court committed error in removing a government witness from the stand without allowing cross-examination by his counsel. The testimony of this witness, covering several pages of the record, added nothing to the proof one way or the other. The court, having perceived this, stated that the witness ". . . might as well go down." Government counsel agreed and no objection whatever was interposed to the procedure by counsel for Blackwell. This occurrence was not plain error, if error at all, under the circumstances. The action of counsel in failing to cross-examine was nothing more than trial strategy and amounts to a waiver of the right. See *Silva v. Klinger*, 9 Cir., 1966, 355 F. 2d 657; *Wilson v. Gray*, 9 Cir., 1965, 345 F. 2d 282.

The next assignment of error is based on exceptions to the charge. It was not error for the court to refer to two of the witnesses as accomplices. This was not an expression of an opinion by the court. They had testified to their part in the scheme. The scheme had been established.

Taken in context, the statement was no more than a comment on the evidence and cast no shadow upon the presumptive innocence of Blackwell. See *Dearinger v. United States,* 9 Cir., 1965, 344 F. 2d 309.

The further contention that the court erred, on the basis of double jeopardy, in submitting all counts to the jury is also devoid of merit. Each count consisted of a separate crime.

There is one additional assignment of error in this case which relates to grand jury proceedings and is common to No. 25,523, also involving Blackwell as a defendant. Hence, this opinion includes both appeals and our discussion and conclusion regarding this assignment of error is dispositive in each case.

In No. 25,523, appellant was convicted on a one count indictment charging him, along with others, of using the mails to defraud an insurance company in violation of 18 USCA, § 1341. Here the scheme was to collect automobile collision insurance proceeds on a false claim for damages. Again Blackwell was the adjuster and again he contends that the evidence was insufficient; again this assignment of error is without merit. The evidence against him was more than ample to make a jury question.

He moved for continuance at the call of the case for trial because of the absence of a witness. The witness was ill. There was no showing of diligence. See *Parsons v. United States,* 5 Cir., 1951, 189 F. 2d 252. There was no showing that the witness could be present in the event of a continuance or that his testimony could be otherwise obtained. There was no proffer as to the testimony to be expected from the witness so as to establish its materiality. See *Jackson v. United States,* 5 Cir., 1964, 330 F. 2d 445; *Chastain v. United States,* 5 Cir., 1943, 138 F. 2d 413. The court did not err in denying the continuance.

The last assignment of error to be considered, common to both appeals, centers on the testimony of Blackwell and his co-defendant Young before the grand jury which later indicted them (No. 25,522),[1] and the production of certain records by them before the grand jury. They appeared before the grand jury under subpoena and were required by subpoena to produce documents and records.

The government contends that at the time they appeared, the grand jury was investigating the conduct of the two arsonists and not their conduct. Blackwell was advised by the United States Attorney at the time of his appearance of his Fifth Amendment right not to incriminate himself. Young was not so advised. Neither resisted the subpoena to appear or to produce. Neither refused to testify. Neither claimed the self-incrimination privilege.

Prior to arraignment, Blackwell vigorously asserted that the indictments in each case were due to be dismissed because of his nexus and that of co-defendant Young to the grand jury which later indicted him. In addition, there was a motion to suppress any evidence adduced by or through either before the grand jury. Parenthetically, we are not told just how the Young appearance connects with Blackwell.

The District Court conducted an extensive hearing on these motions and concluded that it would examine the grand jury proceedings, including the records and documents produced by Blackwell and Young, in camera in an effort to protect Blackwell from any prejudice that might stem from his grand jury appearance. This applied also in No. 25,523 as to Blackwell. This the court

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[1] Mr. Young died pending appeal and his appeal was dismissed.

did and there is no contention that Blackwell was not fully protected from an evidentiary standpoint. We think that the procedure followed by the District Court was tantamount to granting the motion to suppress and therefore there was no error, if error it could have been, in overruling that motion.

The question remains whether the motion to dismiss the indictment should have been granted because of the grand jury appearances. This rests on the privilege against self-incrimination.

It seems clear that Blackwell was in no way prejudiced by the grand jury appearances. Although not directly in point, cf. *Short v. United States,* 9 Cir., 1959, 271 F. 2d 73, on absence of prejudice. Here none of the grand jury evidence was used in the trial nor was there any indication that the testimony or records presented to the grand jury led to other evidence that was used. The court made certain of this by the in camera procedure which it adopted See *Chapman v. California,* 1967, 368 U. S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 on harmless constitutional error. Thus this contention of error falls for lack of prejudice.

It also falls for another reason. The law is that a potential defendant may be subpoenaed to appear before a grand jury and subsequently indicted without violating the self-incrimination proscription of the Fifth Amendment if he testifies voluntarily as here. The privilege must be claimed. See *Rogers v. United States,* 1951, 340 U. S. 367, 371, 171 S. Ct. 438, 95 L. Ed. 344; *United States v. Monia,* 1943, 317 U. S. 424, 427, 63 S. Ct. 409, 87 L. Ed. 376; *United States ex rel. Vajtauer v. Commissioner of Immigration,* 1927, 273 U. S. 103, 113, 47 S. Ct. 302, 71 L. Ed. 560.

The judgments are in all things affirmed.

APPENDIX B.

CHAPTER 63—MAIL FRAUD.

Sec.

1341. Frauds and swindles.

1342. Fictitious name and address.[1]

1343. Fraud by wire, radio, or television.

Historical Note.

1952 Amendent. Act July 16, 1952, c. 879, § 18 (b), 66 Stat. 722, added item 1343.

§ 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

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[1] So in original. Does not conform to section catchline.

Historical and Revision Notes.

Reviser's Note. Based on Title 18, U. S. C., 1940 ed., § 338 (Mar. 4, 1909, c. 321, § 215, 35 Stat. 1130 [derived from R. S. § 5480; Mar. 2, 1889, c. 393, § 1, 25 Stat. 873]).

The obsolete argot of the underworld was deleted as suggested by Hon. Emerich B. Freed, United States district judge, in a paper read before the 1944 Judicial Conference for the sixth circuit in which he said:

> "A brief reference to § 1341, which proposes to reenact the present section covering the use of the mails to defraud. This section is almost a page in length, is involved, and contains a great deal of superfluous language, including such terms as 'sawdust swindle, green articles, green coin, green goods and green cigars.' This section could be greatly simplified, and now-meaningless language eliminated."

The other surplusage was likewise eliminated and the section simplified without change of meaning.

A reference to causing to be placed any letter, etc. in any post office, or station thereof, etc. was omitted as unnecessary because of definition of "principal" in section 2 of this title. 80th Congress House Report No. 304.

1949 Amendment. Act May 24, 1949, substituted "of" for "or" following "dispose".

Legislative History: For legislative history and purpose of Act May 24, 1949, see 1949 U. S. Code Cong. Service, p. 1248.

Emp. Union Local 16, Cal. App. 1968, 65 Cal. Rptr. 676.

32. Sentence

Indictment charging defendant in one count with conspiracy to obstruct and delay commerce by extortion, and in a second count charging defendant with the actual obstruction and delay of interstate commerce by extortion, stated two offenses, and sentences imposed upon defendant following conviction for both offenses were not illegal sentences, and were not subject to correction under this title. Callanan v. U. S., C. A. Mo. 1960, 274 F. 2d 601, affirmed, 81 S. Ct. 321, 364 U. S. 587, 5 L. Ed. 2d 312, rehearing denied 81 S. Ct. 687, 365 U. S. 825, 5 L. Ed. 2d 703.

33. Distinct and separate offenses

A federal prisoner who was convicted under this section of the substantive crime of obstructing commerce by extortion, and who was also convicted under this section of conspiracy to commit the same crime, was convicted of two distinct crimes, and under such Act it was within the discretion of the trial judge to fix separate consecutive sentences for each crime. Callanan v. U. S., Mo. 1961, 81 S. Ct. 321, 364 U. S. 587, 5 L. Ed. 2d 312, rehearing denied 81 S. Ct. 687, 365 U. S. 825, 5 L. Ed. 2d 703.

Fact that some substantive provisions of this section might be repetitive as being variants in phrasing of the same delict, or that a man could not be cumulatively punished for both an attempt to extort and a completed act of extortion under this section, did not establish a

congressional intent to allow only one punishment for the distinctive offenses of conspiracy and the completed crime that is its object. Id.

The conspiracy and substantive offenses under this section proscribing extortion affecting commerce do not merge. Carbo v. U. S., C. A. Cal. 1963, 314 F. 2d 718. Certiorari denied 84 S. Ct. 1625, 1626, 1627, 377 U. S. 953, 12 L. Ed. 2d 498, rehearing denied 84 S. Ct. 1902, 377 U. S. 1010, 12 L. Ed. 2d 1058 (2 mems.).

34. Harmless or prejudicial error

Defendant accused of conspiring to commit extortion and to transmit threats by means of interstate communications was not prejudiced by allegations in indictment that conspiracy contemplated use of persons known to victim to have underworld reputations and to possess necessary power to execute conspirator's demands by force and violence and that defendant was enlisted for that purpose. Carbo v. U. S., C. A. Cal. 1963, 314 F. 2d 718, certiorari denied 84 S. Ct. 1625, 1626, 1627, 377 U. S. 953, 12 L. Ed. 2d 498, rehearing denied 84 S. Ct. 1902, 377 U. S. 1010, 12 L. Ed. 2d 1058 (2 mems.).

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury. Added Pub. L. 87-228, § 1 (a), Sept. 13, 1961, 75 Stat. 498, amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212.

1965 Amendment. Subsec. (b) (2). Pub. L. 89-68 made the section applicable to travel in aid of arson.

Cross References

Wire or oral communications, authorization for interception, to provide evidence of offenses under this section, see section 2516 of this title.

Legislative History: For legislative history and purpose of Pub. L. 87-228, see 1961 U. S. Code Cong. and Adm. News, p. 2664. See, also, Pub. L. 89-68, 1965 U. S. Code Cong. and Adm. News, p. 1847.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1367

CHARLES QUINN BLACKWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The instant petition presents the single question whether petitioner's appearance under subpoena before the grand jury which subsequently returned two indictments against him requires reversal of the convictions obtained pursuant to those indictments. The charges were tried by jury in separate trials in the United States District Court for the Middle District of Georgia. The court below consolidated the two appeals and affirmed both convictions (Pet. App. A).

In No. 25,522 petitioner (who was tried with a co-defendant, Young, who was also convicted but died pending appeal) was convicted on five counts of an indictment charging him, in one count, with conspiracy to commit mail fraud and to travel in interstate commerce to commit the unlawful activity of arson and, in the remaining counts, with substantive violations of the federal statutes punishing those activities (18 U.S.C. 1341, 1952). He was sentenced to concurrent five year terms of imprisonment. The evidence (the sufficiency of which is not in issue) showed that petitioner, an insurance claim adjuster, took part in a scheme to have two houses burned in order to collect the proceeds from insurance on them. In each case petitioner adjusted the fire loss. The houses were burned by two arsonists, who traveled in interstate commerce to carry out the plan.

In No. 25,523 petitioner was convicted on a one count indictment charging him and others with unlawful use of the mails to defraud an insurance company, in violation of 18 U.S.C. 1341. He was sentenced to two and one half years' imprisonment, to run concurrently with the sentences imposed in No. 25,522. The evidence showed that petitioner participated, as the insurance claim adjuster, in a scheme to collect automobile collision insurance proceeds for damages claimed for a fictitious car crash.

Petitioner appeared under subpoena before the federal grand jury which subsequently returned the instant indictments. At the time of this appearance (July 25, 1967), the grand jury was investigating the activities of one Bridges, who played a prominent role

in the arson-insurance scheme, and Hall, one of the arsonists. Prior to testifying, petitioner was warned by the prosecutor that he did not have to say anything which might tend to incriminate him but that anything he did say could be used against him. Petitioner stated that he understood the warnings. At no time did he invoke the privilege against self-incrimination (see 3 R. 42).[1] Affidavits subscribed by the United States Attorney and the F.B.I. agent in charge of the investigation in these cases indicated that the government regarded petitioner as a witness rather than a potential defendant at the time (3 R. 39-49).

In both cases, petitioner made pre-trial motions to suppress evidence and to dismiss the indictment because of this appearance. The trial judge held a lengthy hearing on the motions (3 R. 88-125). In the course of the hearing, petitioner's counsel asked the trial judge to inspect the grand jury testimony *in camera*, in order to protect petitioner from any prejudice that might result from the use of that testimony at trial (3 R. 115). The court ruled that it would not admit any evidence obtained against petitioner as a result of his grand jury appearance. With the consent of the prosecutor, it adopted the procedure defense counsel suggested, and inspected the grand jury's minutes *in camera* (3 R. 121-123). No evidence relating to those proceedings was introduced by the government at either trial. (See R. 680).[2]

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[1] "3 R." refers to the record of proceedings in No. 25,523, a copy of which is on file with the Clerk of this Court.

[2] "R." refers to the record of proceedings in No. 25,522, a copy of which is on file with the Clerk of this Court.

The court of appeals properly held that petitioner was not entitled to reversal simply because the grand jury had subpoenaed him to testify. According to the uncontroverted affidavits of the government prosecutor and agent-in-charge of the investigation, petitioner was not regarded as a potential defendant at the time of his grand jury appearance. The federal courts of appeals have uniformly held that even a potential defendant properly advised of his rights, as in this case, may be subpoenaed as a competent witness before a grand jury. See, *e.g.*, *United States* v. *Fortunato*, 402 F. 2d 79, 82 (C.A. 2), certiorari denied, March 24, 1969 (No. 1273 Misc. this Term); *United States* v. *Capaldo*, 402 F. 2d 821, 823-824 (C.A. 2), certiorari denied, April 21, 1969 (No. 1352 Misc. this Term); *Jones* v. *United States*, 342 F. 2d 863, 880-882 (C.A. D.C.) (en banc).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1969

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 351924 719

CERTIORARI DENIED